APPENDIX A.

Statute Involved.

Rev. Stats., Par. 102, as amended by Chap. 594, Act of June 22, 1938, 52 Stat. 942; U. S. C. A., Title 2, Par. 192:

"Every person who having been summoned as a witness by the authority of either house of Congress to give testimony or to produce papers upon any matter under inquiry before either house or any joint committee established by a joint or concurrent resolution of the two houses of Congress, or any committee of either house of Congress, wilfully makes default, or who, having appeared, refuses to answer any questions pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1000.00 nor less than $100.00 and imprisonment in a common jail for not less than one month nor more than twelve months."

APPENDIX B.

United States Court of Appeals for the Ninth Circuit.

Twentieth Century-Fox Film Corporation, Appellant, vs. Ring Lardner, Jr., Appellee. No. 13,491, Nov. 9, 1954. (216 F. 2d 844.)

On Appeal from the United States District Court for the Southern District of California, Central Division.

Before: STEPHENS and CHAMBERS, Circuit Judges, and CLARK, District Judge.

CHAMBERS, Circuit Judge:

Ring Lardner, Jr., plaintiff and appellee, in the year 1947 was working under written contract as a screen writer for Twentieth Century-Fox Film Corporation. The latter, defendant and appellant, will hereinafter be referred to as "Fox."

Lardner was discharged on November 28, 1947, by Fox. Lardner filed suit and obtained judgment for approximately $25,000 in salary accruing after his discharge. This is a diversity case and Fox has appealed.

The events leading up to the discharge of Lardner start in 1947 with an investigation and hearings of the Un-American Activities Committee of the United States House of Representatives investigating alleged Communist infiltration of the motion picture industry. In advance, House investigators had been to Hollywood, but the actual hearings were in Washington. Those hearings with which we are concerned were held in October, 1947.

Lardner was one of ten witnesses from the motion picture employees who declined to tell the committee whether they were members of the Communist party. The refusal was oblique. The answers were not responsive to the questions and essentially consisted of questioning the au-

thority of the congressional committee. The refusal of Lardner was made on October 30. On November 24, the "ten men," including Lardner, were cited by the House of Representatives for contempt. Prosecution in the district court in Washington, D. C., followed, Lardner being there convicted on June 22, 1950. Meanwhile, Lardner had been discharged by Fox on November 28, 1947, four days after the citation for contempt. The Fox board of directors on November 20 had adopted a resolution providing that any employee cited for contempt of Congress for failing to answer whether or not he was a member of the Communist party should be discharged.

Another of the "ten men" was Lester Cole. He was discharged by Loew's, Incorporated, for the same reason. He sued upon his contract, and his civil action was tried before his conviction in the criminal case in Washington. Lardner's civil case was tried below after he was convicted, after he had served his sentence and after this court's decision on appeal of Cole's case, Loew's Incorporated v. Lester Cole, 185 F. 2d 641. The 1947 congressional hearing on the motion picture industry is at the root of Cole's case and Lardner's. The conduct of the two before the committee is similar in all aspects important to this case. The events of the hearing are well described by Judge Pope in Cole's decision. For brevity, reference is made to the report of Cole's case. Throughout, reference and comparison will be made to the Cole litigation, and the facts herein stated may not be adequate without a reading of Cole's case.

Both Loew's and Fox justified the discharge of Cole and Lardner respectively under the so-called "morals" or "good conduct" clause of the contract. Inasmuch as the Cole decision seemed to have been, and properly so, the

chart for the trial of this cause, it may be well to set forth in parallel columns the good conduct clause of Cole's contract and the similar one in Lardner's contract. They are as follows:

Cole's

"The employee agrees to conduct himself with due regard to public conventions and morals, and agrees that he will not do or commit any act or thing that will tend to degrade him in society or bring him into public hatred, contempt, scorn or ridicule, or that will tend to shock, insult or offend the community or ridicule public morals or decency, or prejudice the producer of the motion picture, theatrical or radio industry in general."

Lardner's

"That the artist shall perform the services herein contracted for in the manner that shall be conducive to the best interests of the producer, and of the business in which the producer is engaged, and if the artist shall conduct himself, either while rendering such services to the producer, or in his private life in such a manner as to commit an offense involving moral turpitude under Federal, state or local laws or ordinances, or shall conduct himself in a manner that shall offend against decency, morality or shall cause him to be held in public ridicule, scorn or contempt, or that shall cause public scandal, then, and upon the happening of any of the events herein described, the producer may, at its option and upon one week's notice to the artist, terminate this conract and the employment thereby created."

One may observe that Lardner's contract said everything that Cole's said and a little more.

Fox justified the discharge on the ground that Lardner by his conduct before the congressional committee, had breached the good conduct clause of the contract and therefore it, Fox, was excused from performance. Lardner replied that he had not breached the contract. but if he had breached it, then Fox, by continuing him on the payroll for almost a month and by giving him a new assignment, had waived the breach and was not justified in discharging him late in November.

While the defense was not expressly pleaded here, just as Cole did, Lardner forcefully claimed that the "ten men," he among them, were encouraged by their employers to defy Congress; that when a public clamor arose over the conduct of the screen writers, the producers then gave up the ten men as a burnt offering to appease public opinion. Both the appearances before Congress and the trial of Lardner's civil case were done with flair, if not flamboyance, by both producers and the screen writers.

Lardner won on the general issue at the trial for damages in the United States District Court for the Southern District of California. Also, the jury, on interrogatories, answered that Lardner had not breached the good conduct clause, but if he had, Fox had waived it.

By specifications of error, Fox raises a number of contentions. The most important ones are asserted as follows:

1. The trial court erred in permitting witnesses to testify on the issue of waiver as to conversations with

certain Fox executives without a requisite foundation of authority.

2. The trial court erred in not receiving in evidence discussions had at the meetings of the board of directors and the executive committee of Fox during the period from the time of Lardner's appearance before the congressional committee in October until his discharge in November.

3. The trial court erred in not admitting into evidence the record of Lardner's conviction of contempt of Congress for his refusal to testify on October 30, 1947.

4. The trial court erred in admitting into evidence the fact that after Lardner's discharge Fox, on all films publicly exhibited and upon which Lardner had worked, continued to give him credit for his part therein. (That is, the films continued to run after his discharge with credit given on the exhibition to Lardner. Or, stated another way, Fox did not rub Lardner's name off the completed films.)

5. The trial court erred in giving certain instructions and refusing others.

Waiver

The Lardner contract called for two stints of ten weeks each, ten weeks being the usual minimum time for a screen writer's work on a scenario. At the time of Cole's discharge at Loew's, he was in the middle of a term of writing. The situation was different with Lardner. At the time of testifying in Washington, Lardner was finishing his work on his first picture (ten weeks) under his contract.

Lardner returned to Hollywood after the congressional hearings, and the production department of Fox went

ahead with plans to use his services further. On November 26, a letter was given Lardner in behalf of Fox (signed by Lew Scheirber, who signed as executive manager). On that date Lardner endorsed his acceptance thereof.

By its terms, the letter referred to the basic contract and stated that Fox had not made up its mind whether it would produce another picture, "House by the River," but Lardner should go to work on it and he would be paid his regular weekly wage of $2,000. If Fox discontinued work therein, the picture would not count as the second picture Lardner was to be assigned under the contract. This letter, together with Fox's delay of 29 days after Lardner testified before the committee in discharging him, was essentially the basis of Lardner's claim that Fox had lost any right which it otherwise may have had to discharge him.

While Fox is "the producer," yet in its organization it has individual company producers who take charge of the production of assigned pictures. William Perlburg was one of these producers and it was with him that Lardner had worked on his picture under the subject contract. Lardner was permitted to testify as to a conversation he had with Perlburg in November, after Lardner's return from Washington. Perlburg was quoted as saying, after the hearings, that Darryl Zanuck, described by Lardner as West Coast manager, had commented unfavorably on the congressional proceedings and that Zanuck had said he was not interested in a man's politics but only in his ability in his particular job. Also, Lardner testified that Perlburg advised him that he wanted to use him on another upcoming project.

The words of Zanuck so introduced would have to come in as an admission, if at all. The record fails to show a proper foundation was laid showing authority in Zanuck to make contracts or to waive breaches of existing contracts. Zanuck may have an abundance of authority, but the court cannot take judical notice thereof. If authority were shown in Zanuck, perhaps Perlburg could testify as to what Zanuck said, if material to any issue, but the objection is obvious to Lardner's testifying that "Perlburg said Zanuck said."

As to Perlburg's expressions of a desire to use Lardner further, again there appears to be a lack of foundation.

Under all the circumstances, the admission of "what Perlburg said" appears to have been highly prejudicial and so prejudicial that reversal is required.

Record of Conviction

Fox has complained that the record of Lardner's conviction for refusing to answer whether he was a member of the Communist party was not admitted in evidence. This court is of the opinion it should have been admitted. The civil jury was specifically permitted to consider from the evidence before it whether the crime had been committed, something already conclusively determined. Certainly the record of his conviction was the best evidence there was that the crime had been actually committed.

And if admitted in evidence, what materiality does it have? In Cole's case, *supra,* it was said that the clause that Cole "would conduct himself with due regard for public conventions" necessarily "includes an agreement to refrain from the commission of a misdemeanor of this character," *i e.,* contempt of Congress by refusing to

answer whether one is a Communist. In Lardner's contract we have the proviso that Lardner shall not conduct himself "in a manner that shall offend against public decency, morality," etc. The words in Lardner's agreement, "decency and morality," surely carry as much implication to refrain from the particular crime here involved as does Cole's clause of "due regard for public conventions."

The law of this circuit having been established by Cole's case, and certiorari having been denied by the Supreme Court, it is appropriate that the implication of the same condition be made here. And upon receipt of the best evidence, conviction of the crime named in the implied clause, the issue of the breach of the contract is settled in favor of Fox.

The court is mindful of the California decision of Board of Education of the City of Long Beach v. King, 82 Cal. App. 2d 857, 187 P. 2d 427. There the issue, on a teacher's discharge under the California tenure law, was whether the teacher had been guilty of *unprofessional conduct* in that he was alleged to have driven a motor vehicle on a highway while under the influence of intoxicating liquor. With a strong dissent, the majority held that the record of conviction of the offense could not be received in evidence. But if a contract provides by express language or by implication that an employee will not commit a certain crime, as held in the Cole case and here held applicable to Lardner, one believes, in the absence of statutory impediment, that California would hold that the best evidence and only the best evidence should be received.

Independent of the actual words of Lardner's contract, it occurs to this court that one ground justifying

Lardner's discharge, for some reason, was not presented to the trial court. Hereinabove, the good conduct clause in the contract has been set forth. The fact that a contract of employment authorizes the employer to terminate it for certain specified causes does not ordinarily prevent the employer from discharging the employee for a legal cause not specified. Corman Aircraft Corporation v. Weihmiller, Cir. 7, 78 F. 2d 241.

After making due allowance for the maxim of *"expressio unius est exclusio alterius,"* one still cannot believe it was the intention of the parties to deny Fox rights to discharge which it had anyway under general law. The first consideration is to determine the intention of the parties. It would appear that the purpose of the good conduct clause was to give Fox something in addition to the general law.

It is implied in every contract of employment that the employee will conduct himself with such decency and propriety as not to injure the employer in his business. Restatement of Agency, § 380, *In re* Nagel, Cir. 2 278 Fed. 105; Brown *et al* v. Dupuy, Cir. 7, 4 F. 2d 367. And there being no dispute as to what the ten men did, the question that should be resolved by the court objectively is whether the conduct of the screen writers, Lardner included, before the House committee, and whether getting themselves convicted of contempt of Congress in refusing to answer that they were or were not members of the Communist party, would tend to hurt their employers.

The screen writers never have had the publicity build-ups as individuals that screen actors have had. There may have been a tendency for the ten men, all acting

about alike before the committee, to be lost in anonymity as so many screen writers. Yet the conduct of and the ultimate conviction of Lardner in the circumstances of the case could not help but hurt Fox and everybody else in the motion picture business. It is true, as the record shows, that some people supported the ten men. But how could it be said that as a result of Lardner's conduct the employer sustained a net gain, or even held its own? Fox just necessarily suffered a net loss in public prestige.

This being a California contract, California decisions would govern. The course that California would follow seems to be indicated by Adams v. Southern Pacific Co., 204 Cal. 63, 266 Pac. 541. Lardner may or may not qualify as a "servant," but Section 3005 of the Labor Code of California[1] would seem to be in harmony with what has been said here. Certainly there was misconduct, and when the misconduct occurred during an investigation by the Congress of Lardner's service to Fox, it should be held that it was in the course of his service to Fox and not a matter separate from his service.

Now returning to the words of Lardner's contract and approaching the case from the portion of the clause referring to "offense involving moral turpitude under federal . . . laws," it is to be observed that the trial

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[1]"3005. Discharge: Grounds. A master may discharge any servant other than an apprentice, whether or not engaged for a fixed term:

"(a) If the servant is guilty of misconduct in the course of his service, or of gross immorality even though such gross immorality is unconnected with his service.

"(b) If, being employed about the person of the master or in a confidential position, the master discovers that the servant has been guilty of misconduct, before or after the commencement of his service, of such a nature that, if the master had known or contemplated it, he would not have so employed the servant."

court instructed the jury that the offense of refusing to answer questions before a committee of Congress did not involve moral turpitude. This instruction probably is rooted in the comment in Sinclair v. United States, 279 U. S. 263, where Mr. Justice Butler, with respect to Harry F. Sinclair's conviction for contempt of Congress, said "No moral turpitude is involved." The statement should be read in the context of the opinion. Mr. Justice Butler was simply saying that the fact that Sinclair relied on competent legal advice in making his refusal to answer questions was no defense—that whether Sinclair willfully refused to answer proper questions of a properly constituted congressional committee was the essential question for Sinclair's jury. The case is authority for the proposition that moral turpitude is not an essential element of the crime. That is not to say that the circumstances of the commission of the crime may not be saturated with moral turpitude. It therefore would seem unnecessary to instruct the civil jury that Lardner's offense in Washington involved no moral turpitude.

With respect to crimes and moral turpitude, there are three possible classifications:

1. Those crimes necessarily involving moral turpitude, for example, frauds;

2. Those crimes which are so obviously petty that a record of conviction does not admit of a suggestion of moral turpitude, for example, overtime parking;

3. Those crimes which may be saturated with moral turpitude, but nevertheless do not contain moral turpitude as a necessary element for conviction, for example, willful failure to pay federal income tax, and refusal to answer proper questions of a congressional committee.

See *In re* Hallinan, 43 A. C. 245, 43 Cal. 2d...., 272 P. 768.

Parenthetically, it may be said that the word "offense" in Lardner's good conduct clause may be given a little broader meaning than "crime." It might justify dismissal for conduct for which no one bothered to prosecute the offender, or something that is no legal crime at all.

But be the foregoing as it may, the district court had before it the record of conviction. It had before it a complete transcript and pictorial record of the performance before Congress of the "ten men," including Lardner. It would appear that although the crime, per se, is one not historically infamous or one requiring as an essential element the proof of facts involving moral turpitude, yet the facts of the particular crime of Lardner in refusing under all circumstances to tell the committee whether he was a Communist should be held moral turpitude as a matter of law—not on the bare record of conviction but on the record of Lardner's actions before the congressional committee which had led to his conviction in the district court in Washington, D. C.[2]

Instructions

With reference to the objections to the instructions, complaint is made that the instructions unduly limited the scope of the jury's inquiry to public reaction to Lardner's conduct. The objection is good, if the issue of breach were to be held properly submitted to the jury. The error was natural when the testimony was by sheer weight tremendous and, on the issue of breach, almost entirely

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[2]The record clearly shows the concert of action of the ten so-called unfriendly men.

devoted to public reaction. But the clause that Lardner should not offend against decency and morality does not involve what the public's reaction in this case actually was. Instructions should have been given, if the case was to go to the jury on breach, concerning decency and morality, *i. e.,* in addition to the instructions on public reaction. Probably the court would have had little trouble on this point if it had considered and given on "decency and morality" the instructions it would have given if the words "public ridicule, scorn or contempt or that shall cause public scandal" had not been in the good conduct clause.

On a retrial, the issue of waiver of defendant's breach will probably be before the jury and be the only question for consideration. Attention is invited to what is said about waiver in Cole's case, *supra,* by Judge Pope. What is said there is reaffirmed. In Lardner's case, the trial court instructed the jury concerning waiver as follows:[3]

"You are instructed that even if an employer has the right to discharge an employee under a contract, the employer may by his words or conduct waive that right. A waiver is such conduct of the employer as shows his election to forego the right to discharge which he might otherwise have taken or insisted upon under the contract. Once such right is waived by the employer, it is gone, so far as the particular conduct is concerned, and cannot be claimed by the employer except for some other or different violation of the employee.

"If an employer by his words and acts leads an employee to believe that certain conduct by the employee will

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[3]The instruction is paraphrased to eliminate references to a companion case tried at the same time, which case is not here on appeal.

not be considered a violation of his employment obligations, and the employee is reasonably justified so to believe, and the employee, in good faith, acts in such belief, then the employer may not thereafter be allowed to treat such conduct as a breach of the employee's obligations.

"An employee has a right to rely on statements of the authorized officers and representatives of a corporation by which he is employed in determining whether a certain course of conduct would violate his obligation as an employee.

"Twentieth Century-Fox had no duty to instruct or tell Lardner how he should or should not testify, or how he should or should not conduct himself before the House Committee on Un-American Activities.

"The belief by Lardner that his employer would not object to his conducting himself as he did before the House Committee on Un-American Activities, does not justify the finding that he was entitled to so conduct himself or that the employer approved such conduct in advance. It must also appear that the employee was reasonably justified in so believing.

"Waiver is the intentional giving up of a right which a party knows he possessed and concerning which he has knowledge of the material facts that have any bearing on such right. Therefore, a party cannot be found to have given up his right unless he does so after he has obtained full information of the material facts that relate to that right.

"If you find that Lardner breached his employment contract and, in consequence, that his employer had the right to discharge him, you must consider whether during the period that Lardner was continued to be employed

his employer was in full possession of the material facts bearing upon its right to discharge. And unless you find by a preponderance of the evidence that the employer intentionally gave up its right after obtaining complete knowledge of the material facts having a bearing on that right, you cannot find that the right was waived by the employer in question.

"The fact that Twentieth Century-Fox knew immediately after Lardner had testified how he had conducted himself before the House Committee on Un-American Activities does not determine that the employer then had full and complete knowledge as to whether its employee's conduct had brought him into public scorn, contempt, or ridicule, or whether his conduct had shocked, offended, or insulted the community. Until the employer had full knowledge as to whether its employee's conduct had had such effect, it did not have complete knowledge of the material facts bearing upon its right to discharge.

"An employer knowing of an employee's conduct which might warrant his discharge may not, except as I shall instruct you, continue to employ the employee and at a later time treat the employee's conduct as a breach of his obligation. In determining whether or not the employer in the present case gave up its right to discharge its employee-plaintiff, Lardner, you should bear in mind that an employer may take a reasonable length of time to investigate and to consider the facts in order to come to a determination as to whether to discharge its employee, and a mere failure to discharge an employee during such a reasonable period of time while the employer is investigating and considering the conduct of its employee is not of itself a waiver of the right to discharge the employee.

And if you find that the employer—Twentieth Century-Fox Film Corporation in the case of Lardner—did in fact keep its employee-plaintiff in its employ after a reasonable length of time had elapsed, as herein instructed, you should find that that employer had waived its right to discharge that employee-plaintiff.

"Even after all the facts bearing upon the employer's right to discharge had become known, the employer had a reasonable time within which to determine what it should do.

"In considering whether the conduct of the plaintiff had the effect on the public which his employer contends it had, you should not consider the effect which such conduct would have had if it had occurred today, but you should project yourself back to October and November of 1947 and consider the effect which that conduct had at the time it occurred and at the time of the discharge by the defendant employer."

While the instruction is unduly limited to "public reaction" and omits consideration of a breach of decency and morality or an offense involving moral turpitude, it does appear to state correctly the California law on waiver of breach of condition or "election," as Williston calls it.[4]

The decision of executive committee and board of directors.

The minutes of the executive committee and the board of directors of Fox are not in the printed record. It

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[4]Also, the instruction should be rewritten keeping in mind that this court holds Fox had a right to discharge Lardner unless the right was waived. Further, there seems to be no evidence in the case justifying submitting to the jury the question of "advance waiver."

would appear that in the end Fox did not pursue its offer of the minutes. It cannot complain of error.

As to these minutes, the trial court and the parties may have been guided by the remarks in Cole's case where it is said, at page 656, "as respects the action taken, and the right to take it, such matters are as irrelevant as would be a transcript of *debates* in its director's meetings." (Emphasis added.)

The statement is correct in context, but the minutes should be tested as to materiality, and insofar as they may reflect intent or conduct with reference to waiver they should be admitted. They should also be examined to ascertain whether they contain material within the well known exceptions to the hearsay rule.

The continued use of Lardner's name

It is not essential that a notice of discharge give the correct reason for discharge, if a justifiable reason existed. The reason specified by Fox in its letter of discharge was that Lardner's conduct had brought Lardner into public ridicule, scorn or contempt. If Fox had to stand on that ground, the continued use of Lardner's name on the exhibition of films might tend in a way to show that Fox didn't believe that the conduct of Lardner had brought him into public scorn, or it might only show that Fox, not legally sure of itself, was afraid to take it off. However, on a retrial, in view of this court's ruling on the breach, the testimony of continued use of Lardner's name should not be admitted.

The case is reversed for further proceedings consistent with this opinion.

(Endorsed:) Opinion. Filed Nov. 9, 1954. Paul P. O'Brien, Clerk.

APPENDIX C.

United States Court of Appeals for the Ninth Circuit. Adrian Scott, Appellant, vs. RKO Radio Pictures, Inc., a corporation, Appellee. No. 14,985.

Jan. 10, 1957.

On Appeal from the United States District Court, Southern District of California, Central Division.

Before: ORR, FEE and CHAMBERS, Circuit Judges.

CHAMBERS, Circuit Judge:

Plaintiff-appellant Scott, a screen director, was discharged by defendant-appellee RKO Radio Pictures, Inc., on November 26, 1947, after his participation as a witness in hearings before the Committee on Un-American Activities of the United States House of Representatives. At the time of the discharge, Scott was working with RKO under an unexpired written contract dated February 10, 1947.

This case is the third of three discharged witnesses of the motion picture industry to come on appeal to this court. The previous cases are Loew's, Inc. v. Cole, 185 F. 2d 641, and Twentieth Century-Fox Film Corp. v. Lardner, 216 F. 2d 844. The statement of this case will be abbreviated by reference to the two prior cases.

The complaint herein was filed January 21, 1948. Meanwhile, Scott had been indicted in the District of Columbia for refusal to answer the committee's questions. Of this crime he was convicted on June 22, 1950. Sentence of one year was imposed on September 27, 1950, and the term of service thereunder was completed about July 28, 1951.

RKO in its notice of discharge to Scott asserted he had breached the "morals clause" of his contract and hurt the

company by his conduct at the hearings, the clause reading as follows:

"At all times commencing on the date hereof and continuing throughout the production or distribution of the pictures, the producer will conduct himself with due regard to the public conventions and morals and will not do anything which will tend to degrade him in society or bring him into public disrepute, contempt, scorn or ridicule, or that will tend to shock, insult or offend the community or public morals or decency or prejudice the corporation or the motion picture industry in general; and he will not wilfully do any act which will tend to lessen his capacity fully to comply with this agreement, or which will injure him physically or mentally."

Parenthetically, we now quote Cole's contract clause and Lardner's:

Cole's: "The employee agrees to conduct himself with due regard to public conventions and morals, and agrees that he will not do or commit any act or thing that will tend to degrade him in society or bring him into public hatred, contempt, scorn or ridicule, or that will tend to shock, insult or offend the community or ridicule public morals or decency, or prejudice the producer of the motion picture, theatrical or radio industry in general."

Lardner's: "That the artist shall perform the services herein contracted for in the manner that shall be conducive to the best interests of the producer, and of the business in which the producer is engaged, and if the artist shall conduct himself, either while rendering such services to the producer, or in his private life in such a manner as to commit an offense involving moral turpitude under Federal, state or local laws or ordinances, or shall conduct himself in a manner that shall offend against decency,

morality or shall cause him to be held in public ridicule. scorn or contempt, or that shall cause public scandal, then, and upon the happening of any of the events herein described, the producer may, at its option and upon one week's notice to the artist, terminate this contract and the employment thereby created."

In Lardner's case we held as a matter of law that there was a breach by Lardner of the express conditions and the implied conditions of Lardner's contract.

In Scott's case the jury on February 15, 1952, found in his favor on special interrogatories and with a general verdict. The trial judge granted a new trial upon the ground that the jury's verdict was against the weight of the evidence. Later Scott's case was submitted to the same trial judge for decision on the same evidence which the jury had seen and heard. The judge then entered findings and a judgment on September 29, 1955, in favor of the defendant, holding the contract breached by Scott, the breach not waived, and the discharge justified.

The findings and conclusions were as follows:

"Findings of Fact and Conclusions of Law

"This cause came on regularly to be heard on August 26, 1955, before the Honorable Ben Harrison, District Judge, sitting without a jury, the parties having expressly waived a jury. Plaintiff appeared by his attorneys Robert W. Kenny, Esq., Charles J. Katz, Esq., and Morris E. Cohn, Esq., Defendant appeared by its attorneys Irving M. Walker, Esq., Herman F. Selvin, Esq., Robert A. Schlesinger, Esq., and Harry J. Keaton, Esq. Evidence on behalf of both parties was received and the cause submitted to the Court for decision. The Court having duly considered the matter, makes its findings of fact and conclusions of law as follows:

"Findings of Fact

I.

"At all times material herein, plaintiff was and is a citizen of the state of California; and defendant was and is a corporation duly organized and existing under and by virtue of the laws of the state of Delaware, and a citizen of that state. The amount in controversy, exclusive of interest and costs, exceeds the sum of $3,000.

II.

"At all times material herein, plaintiff was by profession a motion picture producer and director and had long experience working in such capacities in the motion picture industry; and defendant was and is engaged in the business of producing motion pictures, which motion pictures were and are distributed and publicly exhibited throughout the United States and most of the other countries of the world.

III.

"On or about February 10, 1947, plaintiff and defendant entered into a contract under and by virtue of the terms of which defendant employed plaintiff to render his services as a producer or director of motion pictures, or both, for a term of 104 weeks commencing February 10, 1947, for which services defendant agreed to pay plaintiff the sum of $1400 per week.

IV.

"Under and by virtue of said contract plaintiff agreed, among other things, that he would conduct himself with due regard to public conventions and morals and would not do anything which would tend to degrade him in society or bring him into public disrepute, contempt, scorn or ridicule, or that would tend to shock, insult or offend

the community or public morals or decency or prejudice the defendant or the motion picture industry in general. Said contract was also subject to and bound plaintiff by an implied covenant on his part not to do anything which would prejudice or injure his employer.

V.

"Plaintiff well and truly performed all producing and directing services required by him until on or about November 26, 1947; and defendant well and truly performed each and every obligation on its part to be performed until on or about said date.

VI.

"During the year 1947, the Committee on Un-American Activities of the House of Representatives of the Congress of the United States (hereinafter referred to as the "Committee"), held both closed and public hearing regarding Communist infiltration of the motion picture industry. A public hearing in that regard was held by the Committee in Washington, D. C., on October 20 to 30, 1947. The intention to hold such hearings, the hearings themselves, the testimony given and statements made thereat, and the conduct and activities of the various witnesses who appeared before the Committee were all matters which, at the time they occurred and for a considerable period of time afterwards, were widely, fully and extensively reported, publicized, discussed and commented upon in and by the various media of public information, including newspapers, radio and newsreels, throughout the United States and other countries of the world in which American motion pictures, including those of defendant, were and are distributed and publicly exhibited. The subject and conduct of said hearings, and

particularly the public hearing held in October, and the testimony and conduct of the witnesses who appeared at that hearing were matters which aroused and sustained great public interest, concern, discussion and comment throughout the United States and elsewhere.

VII.

"The expressed attitude of the motion picture industry, including defendant, toward the hearings was that communists had not infiltrated the industry and that no communist propaganda had gotten into its pictures; that committee procedures should be changed and improved so as better to protect the rights of persons appearing, but that the industry would cooperate with the committee to bring out the full facts: This attitude was publicly expressed by industry representatives before and during the hearings, and was widely publicized.

VIII.

"Plaintiff and a number of other persons identified with and prominent in the motion picture industry were subpoenaed to appear and testify before the Committee at the public hearing held in October, 1947, as aforesaid. Nineteen of said persons, including plaintiff, combined and agreed together as to the manner in which they would conduct themselves before the Committee and the testimony which they would and would not give at said hearing. Eleven of said persons, including plaintiff, were called to the stand and examined by the Committee. Each of said persons, including plaintiff, was asked by the Committee whether he was or ever had been a member of the Communist Party and each of them (except for one man who was only temporarily visting in this country), including plaintiff, refused to answer that question

or state whether he was or ever had been a member of the Communist Party.

IX.

"The proceedings in connection with the appearance of plaintiff and the other persons who had refused to answer the questions of the Committee were reported to the House of Representatives by the Committee; and on November 24, 1947, the House, by resolution duly adopted, certified said report to the United States Attorney for the District of Columbia to the end that plaintiff and said other persons might be proceeded against in the manner and form provided by law. The report of the Committee and the resolution of the House were widely reported and publicized in and by all media of public information throughout the United States and elsewhere.

X.

"On December 5, 1947, plaintiff and the other persons referred to in Finding IX, were indicted and thereafter on the trials of said indictments were convicted, in the United States District Court for the District of Columbia, of the crime defined in section 192 of Title 2 of the United States Code. Said indictments and convictions were based on the refusal of said persons, including plaintiff, to answer pertinent questions put to them by the Committee, including the question referred to in Finding VIII.

XI.

"In pursuance to the case of 20th Century Fox vs. Lardner, 216 F. 2 844, the Court finds that:

"The conduct of plaintiff, individually and in concert and agreement with others, at and in connection with said hearing of the Committee, as hereinabove more particularly found, was had without due regard to the part of

plaintiff, and was contrary, to public conventions and morals; said conduct tended to and did bring plaintiff into public disrepute, contempt, scorn and ridicule; said conduct tended to and did shock, insult and offend the community and public morals and decency; and said conduct tended to and did prejudice defendant and the motion picture industry in general. Said conduct also tended to and did cause a large part of the public to believe that plaintiff and those with whom he acted in concert were in fact communists; that communists had infiltrated the motion picture industry; and that the attitude of the motion picture industry, as hereinabove in Finding VII found was not held in good faith and was not in fact the attitude of the industry, but, rather, that the industry, including defendant, was shielding and harboring communists.

XII.

"On or about November 26, 1947, defendant discharged plaintiff from its employ and terminated the contract referred to in Finding III. Said discharge was not wrongful, unlawful or without cause and was not made in bad faith; but was made in good faith upon and for good cause and was rightful, lawful and proper; and said contract was thereby rightfully, lawfully and effectively terminated.

XIII.

"Defendant did not intend to waive and did not waive plaintiff's breach of contract referred to in Findings XI and XII. Defendant did not intend to condone or excuse and did not condone or excuse plaintiff's conduct referred to in Findings VIII and XI, and did not intend to waive or relinquish and did not waive or relinquish its right to discharge plaintiff on account of that conduct. Defendant

exercised its right of discharge seasonably and within a reasonable time after the right arose. Defendant did not induce or lead plaintiff justifiably to believe that conduct of the sort in which he engaged would not affect or endanger his employment.

XIV.

"Plaintiff has not been damaged in any amount whatever by reason of any act or omission of the defendant.

"Conclusions of Law

"In pursuance to the case of 20th Century Fox v. Lardner, 216 F. 2d 844, the Court finds:

"1. The discharge of plaintiff by defendant was made justifiably and upon and for good cause.

"2. The right to discharge was not waived or relinquished by defendant nor was the conduct which gave rise to that right condoned or excused.

"3. Defendant is entitled to judgment that plaintiff take nothing of or from defendant and that the cause be dismissed on the merits, with defendant's costs incurred herein.

"Let Judgment be entered accordingly."

We are confident that the morals clause in Scott's contract was no weaker from management's position than Lardner's. If there be shades of the two, Scott's clause was the stronger or stricter. The implied condition of every California contract of employment was the same. See Lardner's case, supra.

At the hearings, the conduct of the witnesses was not distinguishable.

Here Scott makes a frontal attack on our decisions in the previous two cases, particularly Lardner's. It is done with some persuasiveness. However, we believe Lardner's case was correctly decided and further believe that it should stand as authority here. An opposite result in two companion cases so nearly alike would discredit the law.

The appellant attacks the insertion of the phrase in the findings and conclusions reading as follows: "In pursuance to the Twentieth Century-Fox Film Corp. v. Lardner, 216 F. 2d 844, the court finds:"

The findings certainly are broader and more inclusive than our decision in Lardner's case. We are not sure of the trial court's meaning in the use of the words "in pursuance to." Probably they mean no more than "following." It can be argued the judge has gone beyond the Lardner case and made extensive independent findings. It could be said "In pursuance to" was a parenthetical reference to Lardner, or it could be argued he thought he was compelled to go at least as far as Lardner's case, and said so.

In any event, the judgment should be and is affirmed.

(Endorsed:) Opinion. Filed Jan. 10, 1957.

Paul P. O'Brien, Clerk.

United States Court of Appeals for the Ninth Circuit.

Adrian Scott, Appellant, vs. RKO Radio Pictures, Inc., a Corp., Appellee. No. 14,985.

JUDGMENT

Appeal from the United States District Court for the Southern District of California, Central Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed.

(ENDORSED) Judgment. Filed and Entered. January 10, 1957. Paul P. O'Brien, Clerk.

APPENDIX D.

Testimony of Adrian Scott Before House Committee on Un-American Activities, October 29, 1947. [R. 330-335.]

Mr. Stripling: Mr. Scott, will you state your full name and present address for the record, please?

Mr. Scott: My name is Adrian Scott. My address is 603 North Beverly Drive, Beverly Hills, Calif.

Mr. Stripling: When and where were you born?

Mr. Scott: In New Jersey, on February 6, 1911.

Mr. Stripling: What is your occupation?

Mr. Scott: I am a producer.

Mr. Stripling: How long have you been a producer?

Mr. Scott: I believe it is a little over 2 years.

Mr. Stripling: Are you here before the committee in response to a subpoena served upon you on September 19?

Mr. Scott: I am.

Mr. Stripling: And in response to a telegram sent to you on October 11 by the chairman calling for your appearing on October 29; is that right?

Mr. Scott: Yes; that is right.

Mr. Stripling: Do you have a statement, Mr. Scott?

Mr. Scott: I do have a statement which I would like to read. I believe the statement is pertinent. It deals with 'Crossfire' and anti-Semitism.

The Chairman: Just a minute. We are trying to read the statement.

Mr. Scott: Thank you.

The Chairman: It is hard to read the statement and listen to you at the same time.

(After a pause.)

The Chairman: This may not be the worst statement we have received, but it is almost the worst.

Mr. Scott: May I disagree with the chairman, please?

The Chairman: Therefore, it is clearly out of order, not pertinent at all, hasn't anything to do with the inquiry, and the Chair will rule that the statement will not be read.

Mr. Stripling.

Mr. Stripling: Mr. Scott, are you a member of any guild, either the Screen Directors Guild or the Screen Writers Guild?

Mr. Scott: I don't think that is a proper question, Mr. Stripling.

Mr. Stripling: Were you ever a member of the Screen Writers Guild?

Mr. Scott: Mr. Stripling, I repeat, I don't think that is a proper question.

Mr. Stripling: Are you now or have you ever been a member of the Communist Party?

Mr. Scott: May I answer the first question, Mr. Stripling?

Mr. Stripling: You said it wasn't a proper question.

Mr. Scott: I will see if I can answer it properly.

The Chairman: You said it wasn't a proper question.

Mr. Scott: I believe it is a question which invades my rights as a citizen. I do not believe it is proper for this committee to inquire into my personal relationships, my private relationships, my public relationships.

The Chairman: Then you refuse to answer the question?

Mr. Scott: The committee has no right to inquire into what I think, with whom I associate.

Mr. Stripling: We are not inquiring into what you think, Mr. Scott.

Mr. Scott, we would like to know whether you were ever a member of the Screen Writers Guild.

Mr. Scott: I believe I have answered your question.

Mr. Stripling: Mr. Chairman, I ask that you direct the witness to answer the question.

The Chairman: The witness will have to answer the question.

Mr. Scott: I beg your pardon?

The Chairman: The witness must respond to the question by answering.

Mr. Scott: I believe I have responded to the question, Mr. Chairman.

The Chairman: Do you decline to answer the question?

Mr. Scott: I have answered it the way I would like to answer it.

The Chairman: Were you ever a member? I don't know from your answer whether you were or were not a member.

Mr. Scott: My answer still stands.

The Chairman: Are you a member?

Mr. Scott: I believe I have answered the question. Would you like me to answer it in the way I did before?

The Chairman: From your answer, I must be terribly dumb, but from your answer I can't tell whether you are a member or not.

Mr. Scott: Mr. Thomas, I don't agree with you. I don't think you are. I have answered the question the best way I can.

The Chairman: Mr. Vail, can you tell whether he is a member or not?

Mr. Vail: No; I cannot.

The Chairman: Mr. McDowell, can you tell?

Mr. McDowell: No.

The Chairman: I just can't tell whether you are a member.

Mr. Scott: I am very sorry.

Mr. Stripling: Mr. Scott, could you tell the committee whether or not you are now or have ever been a member of the Communist Party?

Mr. Scott: Mr. Stripling:, that question is designed to inquire into my personal and private life. I don't think it is pertinent to this—I don't think it is a proper question either.

Mr. Stripling: Do you decline to answer the question, Mr. Dmytryk?

Mr. Scott: Mr. Scott.

Mr. Stripling: Mr. Scott.

Mr. Scott: I believe that question also invades my rights as a citizen. *I believe it also invades the first amendment.* I believe that I could not engage in any conspiracy with you to invade the first amendment. (Emphasis supplied.)

The Chairman: Now, we can't tell even from that answer whether you are a member of the Communist Party.

Mr. Stripling: I repeat the question, Mr. Scott: Can you state whether or not you have ever been a member of the Communist Party?

Mr. Scott: I repeat my answer, Mr. Stripling.

The Chairman: All right, the witness is excused.